No. 15,735

United States Court of Appeals

For the Ninth Circuit

NG YIP YEE,
Appellant,

vs.

BRUCE G. BARBER, District Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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Subject Index

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BRIEF FOR APPELLEE.

FACTS.

The appeal herein constitutes the third appeal to this Court in the matter of *Ng Yip Yee v. Barber.*

Appeal No. 1. On July 1, 1953 the American Consul at Hong Kong issued a passport to Ng Yip Yee. On August 20, 1953, the Secretary of State invalidated and revoked the passport; Ng Yip Yee arrived at San Francisco on August 27, 1953. He was then detained by appellee and held for hearing before a Special Inquiry Officer. On September 17, 1953 the hearing commenced. On September 15, 1953 appellant

filed a petition for a writ of habeas corpus. The contention was that he had initiated a proceeding before the State Department for determination of his citizenship and that the Secretary had made a determination by issuing the passport and that therefore the appellee had no power to detain him. The lower Court denied the writ and dismissed the petition. On appeal to this Court appellant Ng Yip Yee filed a motion for bail pending appeal. A countermotion to dismiss the appeal on the ground that the action below was premature was granted February 4, 1954. 210 F. 2d 613, cert. den. 347 U.S. 988.

Appeal No. 2. Subsequent to the disposition of Appeal No. 1, the administrative proceedings were completed. The Special Inquiry Officer's decision adverse to Ng Yip Yee was appealed to the Board of Immigration Appeals. The Board treated the hearing of the appeal as a trial de novo and reappraised the evidence adversely to the appellant. A petition for a writ of habeas corpus was filed seeking to have the decision of the Immigration and Naturalization Service set aside. The District Court denied the writ and dismissed the petition. On appeal to this Court, by opinion dated September 8, 1955, the decision was reversed on the ground that the Special Inquiry Officer had applied the wrong burden of proof. 225 F. 2d 707. This Court held that the Board of Immigration Appeals should have returned the case to the Special Inquiry Officer who heard the witnesses for his appraisal of the evidence applying the ordinary burden of proof. The writ of habeas corpus was

granted for this purpose, remanding the case back to the Special Inquiry Officer for rehearing.

Appeal No. 3. On the mandate of this Court in Appeal No. 2 the case was remanded to the Special Inquiry Officer. On February 16, 1956, a rehearing was held pursuant to the mandate and remand. The Special Inquiry Officer then made his appraisal of the evidence applying the ordinary burden of proof in accordance with the direction of this Court. Appellant was ordered excluded.

An appeal to the Board of Immigration Appeals was dismissed. Appellant on November 2, 1956 filed a petition for review of the administrative proceedings in the Court below. By order filed August 16, 1957 the relief prayed for was denied and the proceedings and order of the Immigration and Naturalization Service were approved. Findings of fact and conclusions of law dated August 29, 1957 were filed and entered September 10, 1957. On September 11, 1957 a judgment dated September 10, 1957 and filed on September 10, 1957, was entered; on September 20, 1957 the notice of the present appeal was filed.

JURISDICTION.

The notice of appeal appearing in the typewritten transcript at page 27 states:

> "Notice is hereby given that on this 3rd day of September, 1957, plaintiff hereby appeals to the United States Circuit Court of Appeals for the

Ninth Circuit from the order of this Court dated on the 29th day of August, 1957."

This notice was filed on September 20, 1957. It refers to an order dated *on* the 29th day of August. There is no order *dated* August 29, 1957. There is no order which could have been dated *on* the 29th day of August, 1957. The first order in the case was filed by the judge on August 16, 1957 (Tr. p. 21) and may be held by this Court to be the final order from which the appeal should have been noted. The findings of fact and conclusions of law (Tr. p. 23) were dated and filed on September 10, 1957. The judgment (Tr. p. 26) was dated and filed on September 10, 1957, and entered September 11, 1957.

Appellant has failed to file a notice of appeal from either the order of August 16, 1957 or the judgment entered September 11, 1957. The appeal should be dismissed.

Joy Allen v. Schnuckle, 253 F. 2d 195 (9th Cir.).

STATEMENT OF POINTS.

Appellant states two points on appeal.

(1) The Court erred in failing to allow appellant a re-hearing as provided for in the order of the Appellate Court.

(2) The Court erred in finding that there was no expression of prejudice by the Special Inquiry Officer.

ARGUMENT.

I.

APPELLANT WAS ACCORDED A REHEARING PURSUANT TO THE MANDATE.

From appellant's brief, it would appear that there is reliance on an unstated premise, to-wit: upon the bare specification of error or statement of the point, the Appellate Court will sua sponte exhaustively examine the record and research the law regardless of whether or not the appellant has done so.

Appellant at page 5 of his brief says "we disagree with the interpretation given by the trial Court (Tr. p. 21), in that it denied the right given to appellant by the Court of Appeals to a new hearing."

The interpretation, disagreement with which is indicated, is contained in the quotation on page 5 of appellant's brief immediately preceding the above quoted sentence, to-wit:

> "I do not read the Circuit's opinion (Ng Yip Yee v. Barber, 225 Fed. 2d 707) as an order directing a hearing de novo. It merely directs that the testimony be reheard and that all the documentary data be reincorporated into a new administrative hearing. This directive had been complied with."

Two cases are cited by appellant presumably in support of the said disagreement. They both are in accord with the trial Court's interpretation.

In *Rogers Const. Co. v. Alaska Ind. Bd.*, 116 F. Supp. 65 at page 66 after stating "A rehearing implies a re-examination and re-consideration" the judge

went on to say "there is nothing to rebut the presumption that the Board properly performed its function and heard evidence of jurisdictional facts not presented in support of the first claim from which I conclude that there was no rehearing in the strict sense." The plaintiff had contended that the award of the Board was upon a rehearing which it had no power to grant.

United States v. Bertelsen & Petersen Eng. Co., 98 F. 2d 132 was concerned with a petition for a rehearing in the Court of Appeals. On rehearing the case was "to be heard anew on the question to which the rehearing is limited."

The opinion in the second *Ng Yip Yee* appeal was filed September 8, 1955. Reference in the opinion was made to the prior decision of this Court in *Mar Gong v. Brownell,* 209 F. 2d 448, in holding that the Special Inquiry Officer had applied the wrong burden of proof.

Prior to the aforementioned decision of this Court in *Mar Gong,* the District Court, Northern District, California, held in *Ly Shew v. Dulles,* 110 F. Supp. 50 that the burden upon the claimant was heavier than the ordinary burden. On appeal to this Court the judgment of the District Court was vacated December 30, 1954, 219 F. 2d 413 and the cause remanded to the District Court with instruction to make new findings after applying the ordinary burden of proof. The District Court in accordance with the mandate reheard the matter by re-examining the record after hearing further argument by counsel. New findings and judg-

ment in favor of defendant were entered. On second appeal to this Court the judgment was affirmed and the appeal dismissed after the appellant confessed fraud November 16, 1956. No. 14,768.

In *Chow Sing v. Brownell,* 217 F.2d 140, this Court vacated a judgment in favor of the defendant and remanded with instruction to apply the ordinary burden of proof as in the *Ly Shew* case. The District Court reheard and re-examined after argument by counsel and entered judgment for the defendant. On a second appeal the judgment was affirmed. *Chow Sing v. Brownell,* 235 F.2d 602.

A similar decision was made in *Lee Shew v. Brownell*, 219 F. 2d 301 (Feb. 1, 1955). The District Court after rehearing and re-examining entered judgment for the defendant. No second appeal was taken.

In *Wong Gong Fay v. Brownell*, 224 F. 2d 717 (July 22, 1955) a similar procedure was again followed. The Court below entered a judgment in favor of defendant and on a second appeal the judgment was affirmed.

The only difference in the case at bar from the above series of cases is that the remand here was back to the Special Inquiry Officer.

Appellant has disclosed no error in the procedure.

II.

SPECIFICATION OF PREJUDICE IS WITHOUT MERIT.

Appellant's second specification is prejudice by the Special Inquiry Officer.

The statement of the Special Inquiry Officer at the commencement of the hearing is quoted:

> "In granting this hearing *I propose to stand on the prior record,* which I now have before me and which consists of all the prior testimony and Exhibits entered of record in this proceeding together with subsequent briefs, arguments and written orders in all proceedings up to the time that the case was decided before the Court of Appeals mentioned at the outset of the proceedings. Do you have anything further to present?" (Italics appellant's.)

Appellant by his counsel then handed an affidavit of prejudice to the Special Inquiry Officer.

By italicizing, appellant has designated the portions of the Special Inquiry Officer's remarks which appellant considers to support his charge of prejudice. It would appear that, *"I propose to stand on the prior record"* constitutes the words which support the sentence, "It is clear from the words of the Hearing Officer that he had already prejudged and arrived at his decision at the very outset of the alleged hearing" (p. 6, line 23 appellant's brief).

There is no merit to this contention.

CONCLUSION.

It is respectfully submitted that this appeal is wholly without merit and frivolous and should be dismissed.

Dated, San Francisco, California,
August 5, 1958.

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